IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

CLARENCE JONES,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of Social Security,

Defendant.

Civ. No. 09-645-AA

OPINION AND ORDER

AIKEN, Chief Judge:

Plaintiff seeks judicial review of the Social Security Commissioner's final decision denying his application for supplemental security income (SSI) benefits under Title XVI of the Social Security Act (the Act). This court has jurisdiction under 42 U.S.C. § 405(g). The decision of the Commissioner is reversed and remanded for an award of benefits.

BACKGROUND

On September 28, 2004 plaintiff protectively filed an application for SSI. Tr. 87-100. His application was denied

initially and upon reconsideration, and plaintiff timely requested an administrative hearing. Tr. 32-33, 63-65, 74-78. On February 14, 2008, plaintiff and a vocational expert appeared and testified before an administrative law judge (ALJ). Tr. 537-62. On May 30, 2008, the ALJ issued a decision finding plaintiff able to perform his past relevant work, thus finding plaintiff not disabled within the meaning of the Act. Tr. 16-31. The Appeals Council denied plaintiff's request for review, and the ALJ's ruling became the final decision of the Commissioner. Tr. 5-7. Plaintiff now seeks judicial review.

At the time of the ALJ's decision, plaintiff was forty-eight years old with high-school equivalence education and past relevant work as a grinder, book stacker, and laborer. Tr. 87, 102-06, 539. Plaintiff alleges disability primarily due to mental limitations and shoulder pain.

STANDARD OF REVIEW

This court must affirm the Commissioner's decision if it is based on the proper legal standards and the findings are supported by substantial evidence in the record. Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison v. NLRB, 305 U.S. 197, 229 (1938)). The court must weigh "both the

evidence that supports and detracts from the [Commissioner's] conclusions." Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986). Where the evidence is susceptible to more than one rational interpretation, the Commissioner's conclusion must be upheld. Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982).

COMMISSIONER'S DECISION

The initial burden of proof rests upon the claimant to establish disability. Howard v. Heckler, 782 F.2d 1484, 1486 (9th Cir. 1986). To meet this burden, a claimant must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months . . . ." 42 U.S.C. § 423(d)(1)(A).

The ALJ evaluated plaintiff's allegation of disability pursuant to the relevant sequential process. See Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. § 416.920. At step one, the ALJ found that plaintiff had not engaged in "substantial gainful activity" during the period of alleged disability. Tr. 21; 20 C.F.R. § 416.920(b).

At steps two and three, the ALJ found that plaintiff had medical determinable impairments of bilateral rotator cuff strain, schizoaffective disorder, and cocaine abuse, in remission, but that plaintiff's impairments did not meet or equal "one of a number of listed impairments that the [Commissioner] acknowledges are so

severe as to preclude gainful activity." Tr. 21-22; 20 C.F.R. § 416.920(c),(d). Accordingly, the inquiry moved to step four.

At step four, the ALJ assessed plaintiff's residual functional capacity (RFC) and found that plaintiff retained the RFC to perform medium work. 20 C.F.R. § 416.920(e). Specifically, the ALJ found that plaintiff could lift and carry fifty pounds occasionally and twenty pounds frequently, with no restrictions on his ability to walk, stand, or sit. The ALJ also found that plaintiff was limited to simple, repetitive tasks in a non-public setting with occasional contact with co-workers. Tr. 23, 30. Based on this RFC assessment, the ALJ found that plaintiff retained the RFC to perform his past relevant work as a grinder and book stacker. Tr. 30; 20 C.F.R. § 416.920(f). Therefore, the ALJ did not proceed to step five and found plaintiff not disabled under the meaning of the Act. Tr. 30.

DISCUSSION

Plaintiff argues that the ALJ erred in rejecting the opinion of several medical providers, finding plaintiff not credible, improperly rejecting lay witness testimony, and providing inadequate findings at step three. I agree that the ALJ erred in rejecting the opinion of examining and treating medical and mental health providers.

In finding plaintiff not disabled, the ALJ rejected the uncontradicted opinion of Dr. Neville, an examining physician, who

determined that plaintiff was able to lift only twenty pounds. Tr. 344. The ALJ also rejected the opinions of Steven Barry, Ph.D. and Matilda Mengis, M.D. regarding plaintiff's mental limitations and capacities. The ALJ also discounted or failed to address the opinions of several mental health providers.

It is well-established that an ALJ may reject the uncontradicted opinion of a treating or examining physician by providing clear and convincing reasons supported by substantial evidence in the record. See Lester v. Chater, 81 F.3d 821, 830-31 (9th Cir. 1995); Andrews v. Shalala, 53 F.3d 1035, 1041 (9th Cir. 1995). I find that the ALJ did not provide clear and convincing reasons to reject these opinions.

The ALJ rejected the finding of Dr. Neville regarding plaintiff's ability to lift and carry, because the ALJ felt those findings conflicted with Dr. Neville's description of plaintiff's functioning. Tr. 28. However, Dr. Neville based that particular finding on plaintiff's reduced range of motion in his shoulders, as set forth in Dr. Neville's report. Tr. 342-43. Further, as noted by the ALJ, a non-examining, consulting physician adopted Dr. Neville's findings after reviewing the medical record. Tr. 364. The ALJ cannot substitute his judgment for those of medical experts, particularly when the medical findings are uncontradicted. See Winfrey v. Chater, 92 F.3d 1017, 1022 (10th Cir. 1996); Schmidt v. Sullivan, 914 F.2d 117, 118 (7th Cir. 1990) ("But judges,

including administrative law judges of the Social Security Administration, must be careful not to succumb to the temptation to play doctor."). Thus, I find that the ALJ failed to provide clear and convincing reasons to discount Dr. Neville's uncontradicted findings.

The ALJ likewise discredited the conclusion and findings of Dr. Barry, an examining psychologist, and Dr. Mengis, a treating psychiatrist. Dr. Barry interviewed plaintiff, spoke with plaintiff's counselor on two occasions, reviewed plaintiff's medical and mental health records, performed a personality inventory, and prepared a written report. Tr. 330-39. Dr. Barry opined that plaintiff was "disabled" due to a combination of disorders, that his problems were "chronic," that they would last more than twelve months, and that plaintiff should not manage his own finances. Tr. 339. Dr. Barry further asserted that plaintiff was "markedly limited" in his abilities to maintain attention and concentration for extended periods, to complete a normal workday and workweek without interruptions from psychologically-based symptoms, and to perform at a consistent pace without an unreasonable number and length of rest periods. Tr. 463.

The ALJ discredited the mental limitations set forth by Dr. Barry, because it was in a "check-box" form with no medical statement. Tr. 29. However, Dr. Barry indicated that the assessed limitations were based on his report, which set forth the bases for

Dr. Barry's opinion and conclusions. Tr. 339, 463. The ALJ further discredited Dr. Barry's conclusion regarding plaintiff's low Global Assessment Functioning (GAF) score, because "as the State agency reported, Dr. Barry relied upon conflicting information offered by the plaintiff in reaching that score." Tr. 29. However, the ALJ does not identify what information was conflicting or why such information did not support Dr. Barry's GAF assessment or overall evaluation of plaintiff. Moreover, Dr. Barry did not rely solely on plaintiff's statements in rendering his opinion; he also relied on medical evidence and discussions with plaintiff's counselor. Tr. 330, 334. Therefore, I find that the ALJ failed to provide legally sufficient reasons to give greater weight to the opinion of a non-examining physician than to the opinion Dr. Barry, an examining psychologist. See Widmark v. Barnhart, 454 F.3d 1063, 1066-67 & n.2 (9th Cir. 2006) (a contrary opinion of a non-examining medical expert does not constitute substantial evidence to support rejecting a treating or examining physician's opinion); Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir. 2001) (accord).

Dr. Mengis, a treating psychiatrist, completed an evaluation of plaintiff in January 2008. Tr. 492-94. She rendered several diagnoses and noted that plaintiff was experiencing continuing difficulty with concentration and memory, as well as depression and anxiety. Tr. 493. Dr. Mengis assessed plaintiff with a GAF score

of 43, indicating serious symptoms and functional problems. Tr. 494. The ALJ discredited Dr. Mengis's opinion, disagreeing with her assessment of plaintiff's mental status during the evaluation. Tr. 29. I do not find this reason clear and convincing or specific and legitimate. Again, the ALJ cannot substitute his own judgment for that of a treating physician, particularly when the evidence supports the physician's opinion. Thus, I find that the ALJ failed to give legally sufficient reasons to reject the opinions of Dr. Mengis.

The ALJ's rejection of these opinions is rendered more problematic in light of the extensive evidence of record that reflects plaintiff's long-standing mental impairments. 20 C.F.R. § 416.927(d)(4). Many of plaintiff's mental health care providers have documented his mental impairments and resulting difficulties and indicated that plaintiff is unable to perform sustained employment. Tr. 139-47, 173-74, 383, 394, 453-54, 466-67, 478-80. While the ALJ cited certain provider notes to support his finding that plaintiff's condition improved at times, tr. 27-28, the ALJ ignored those that indicated continuing debilitating mental limitations. The ALJ cannot pick and choose among the evidence of record to support his findings. Robinson v. Barnhart, 366 F.3d 1078, 1083 (10th Cir. 2004) ("The ALJ is not entitled to pick and choose from a medical opinion, using only those parts that are favorable to a finding of nondisability."); Switzer v. Heckler, 742

F.2d 382, 385-86 (7th Cir. 1984) ("[T]he Secretary's attempt to use only the portions [of a medical report] favorable to her position, while ignoring other parts, is improper.").

The final question is whether the case should be remanded for further administrative proceedings or for an award of benefits. Harman v. Apfel, 211 F.3d 1172, 1178 (9th Cir. 2000). Accepting the medical and psychological evidence cited above as true, I find an award of benefits appropriate. Widmark, 454 at 1069; Holohan v. Massanari, 246 F.3d 1195, 1211 (9th Cir. 2001). Dr. Barry opined that plaintiff was markedly limited in his ability to sustain concentration throughout the workday, and the vocational expert testified that this limitation would preclude competitive employment. Tr. 463, 561. Therefore, no outstanding issues remain to determine disability.

CONCLUSION

The ALJ's finding that plaintiff is not disabled under the Act is not supported by substantial evidence in the record, and no outstanding issues remain. Accordingly, the decision of the Commissioner is REVERSED and REMANDED for an award of benefits.

IT IS SO ORDERED.

DATED this 22nd day of November, 2010.

Ann Aiken
United States District Judge